Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	)	CG Docket No. 02-278
	)	

To: The Commission

PETITION FOR RECONSIDERATION

I, Dennis C. Brown, pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. §1.429, hereby file the instant Petition for Reconsideration of the Commission's Report and Order (FCC 03-153 Released July 3, 2003) (68 FR 44144 July 25, 2003) (R&O) in the above captioned proceeding. In support of my position, I show the following.

Table of Contents

Summary Of The Filing

In numerous respects the Commission's actions were unreasonable and arbitrary and capricious. The Commission did not act in accord with the requirements of statute in selecting an administrator for its national do-not-call list. The Commission permitted a telemarketer to continue to call a consumer for an unreasonable and an arbitrary and unreasonable period of time after receiving a request to be placed on a company specific list. The Commission acted unreasonably and arbitrarily and capriciously in not requiring telemarketers to receive requests for listing during all hours that they were open for and doing telemarketing business. The Commission acted unreasonably, arbitrarily and capriciously, and without statutory authority in distinguishing among unsolicited fax messages sent over a regular phone line on the basis of the intermediate routing of the transmission. The Commission acted unreasonably in continuing to permit telemarketers to call numbers which are on the do-not-call list for up to three months after listing. The Commission acted unreasonably in adopting rules which permit a telemarketer to abandon a call. The Commission should reconsider its actions and revise its rules as requested herein.

Administrator Selection Was Not In Accord With Statute

Section 227(c)(3)(A) of the Communications Act of 1934, as amended, provides that if the Commission determines to require the use of a national database, then the Commission's regulations shall "specify a method by which the Commission will select an entity to administer such database," 47 U.S.C. §227(c)(3)(A). At paragraph 40 of its R&O, the Commission stated that it had

> evaluated AT&T Government Solutions, the entity selected by the FTC to administer the national database, and conclude[d] that it has the capacity to establish and administer the national database. Congress has reviewed and approved funding for the implementation of that database. We believe that it is unnecessary to evaluate any other such entities at this time.

At paragraph 76 of its R&O, the Commission concluded that "a single national do-not-call database, administered by the vendor selected by the FTC, will ultimately prove the most efficient and economical means," R&O at para. 76.

At paragraph 16 of its R&O, the Commission acknowledged the requirements imposed on it by statute, including the requirement of Section 227(c)(3)(A). Nevertheless, the Commission failed to adopt any regulation specifying a method by which the Commission will select an entity to administer the national database.

If the Commission is to require the use of a national database, then the Commission, and no one else, must select an entity to administer such database. Nothing in the Telephone Consumer Protection Act or the Do-Not-Call Implementation Act authorized the Commission to delegate its authority to select an administrator to a different agency. If the Commission were to establish a do-not-call list, section 227(c)(3)(A) required the Commission to select an

administrator. Section 227(c)(3)(A) does not authorize the Commission to delegate the selection to the FTC and avoid making a selection independently, proceeding in accord with a method which the Commission establishes by regulation. Accordingly, the Commission's delegation to the FTC without adopting and acting in accord with the required regulation was arbitrary and capricious, contrary to statute and in excess of its statutory jurisdiction.

It is essential that the Commission make an independent selection pursuant to a method which it establishes by regulation because nowhere in the R&O did the Commission consider whether AT&T Government Solutions would be qualified by character to administer the Commission's do-not-call list. In just the past year, the Commission has found that in 69 instances AT&T Corporation engaged in abusive telemarketing practices by slamming telephone consumers, see, *e.g.*, In the Matter of AT&T Corporation; Complaint Regarding Unauthorized Change of Subscriber's Telecommunications Carrier, IC No. 02-S79503 (Released July 17, 2003), IC No. 02-S80352 (Released July 3, 2003), IC No. 03-I0027793 (Released July 3, 2003). In view of the Commission's repeated findings of telemarketing abuses by AT&T Corporation, the public interest required the Commission to adopt a regulation under which it would carefully consider all aspects of whether AT&T Government Solutions was a reasonable choice for the administrator task.

Immediate Cessation Of Hostilities Should Be Required

At paragraph 94 of the R&O, the Commission observed that the process of adding numbers to a company-specific do-not-call list is largely automated. Nevertheless, the

Commission unreasonably and arbitrarily and capriciously permitted a telemarketer to continue to call a consumer for up to thirty days from the date that the consumer requests not to be called.

The Commission did not refer to anything in the record to support its decision to allow a telemarketer to continue to assault an unwilling consumer an unlimited number of times over a 30 day period after being told to stop. This is 2003, not 1803. If telemarketers functioned in a world of clerks sitting on high stools, outfitted with pinc-nez glasses and green eye-shades, marking foolscap with quill pens, a telemarketer might require a few days within which to strike a number from its list. However, the Commission well knows that telemarketers rely on computers to maintain their databases. It would be an elementary matter of computer programming for a telemarketer to provide an on-screen command button by which a solicitor can mark a phone number for no more calls, instantly. It should cost little and require little effort to program telemarketing computers by October 1, 2003, for an immediate cessation of calls to a number in response to a consumer's company-specific

request. The Commission should reduce the period of time by which a telemarketer must respond to a company-specific request and cease calling to 24 hours.

Time of Day Limits Were Unreasonable

The Commission decided not to revise the period of time during the day that telemarketers may call. The Commission continued to permit telemarketers to call between the hours of 8 a.m. and 9 p.m. local time at the called party's location. Although I suggested a different period in my comments, I do not request reconsideration of that time period. However, at note 492 of the R&O, the Commission established an unreasonably narrow window of time during which a telemarketer must receive calls from consumers requesting to be placed on a company-specific list. Although not adopting a codified rule, the Commission ordered that a telemarketer must receive calls requesting to be placed on a company-specific do-not-call list between the hours of only "9 a.m. — 5 p.m., Monday through Friday," *id.*

The Commission's decision was unreasonable in two respects. A telemarketer is permitted to call consumers between 8 a.m. and 9 p.m., any day of the week. It should be obvious that a telemarketer who calls consumers between the hours of 8 a.m and 9 a.m. or between the hours of 5 p.m. and 9 p.m. is open for business and is doing business at those times.

It should also be obvious that a telemarketer which places telemarketing calls on Saturday or Sunday is open for business and doing business at those times. If the consumer has to answer the phone during those hours, it is only reasonable that the telemarketer should have to answer its phone during those same hours. There can be no reason that the Commission should not require a telemarketer to answer its telephone to receive do-not-call requests during all hours that it is making telemarketing calls.

The Commission failed to specify a time zone or zones within which the 9 to 5 period must lie. As the requirement was stated by the Commission, a telemarketer could choose to receive calls only on Manila time or on Tokyo time.[1] The Commission should require, in a codified rule, that a telemarketer must receive calls from consumers, at the least, during the hours of 8 a.m. and 9 p.m. local time in the time zones of all numbers which it called during that day on any day of the week.

While the rule suggested in the paragraph above would be more reasonable than the rule adopted at note 492, the Commission should go further and provide a reasonable period of time

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[1] When it's 9 a.m. to 5 p.m. in Washington, DC, it's 9 p.m. to 5 a.m. in Manila. Few American consumers can reasonably be expected to adjust their schedules to call during those hours.

after telemarketing hours to allow a consumer to call a telemarketer to request placement on its do-not-call list. If a telemarketer called a consumer at 8:59:40 p.m. but abandoned the call, the consumer would have to wait until the next day to call to demand relief. Under the rule adopted at note 492, if a telemarketer abandoned a call to a consumer on a Saturday or a Sunday, then not only would the consumer have to wait as long as two days to call, but the telemarketer would steal up to two additional days before it had to stop harassing the consumer. To reduce the burden on consumers without imposing an unreasonable burden on telemarketers, the Commission should require a telemarketer to receive calls until 10 p.m. local time at the location of all numbers which it called during that day on any day of the week.

Fax Routing Distinctions Were Unreasonable And Arbitrary And Capricious

At paragraph 200 of its R&O, the Commission reasonably held that "faxes sent to personal computers equipped with, or attached to, modems . . . are subject to the TCPA's prohibition on unsolicited faxes." However, providing no reasoning whatsoever, the Commission stated that "we emphasize that any rules the Commission adopts with respect to unsolicited facsimile advertisements would not extend to facsimile messages transmitted as

email over the Internet. *See* definition of telephone facsimile machine at 47 U.S.C. §227(a)(2)," R&O at n. 732.

Section 227(a)(2) of the Act defines "telephone facsimile machine" as

> equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper,"

47 U.S.C. §227(a)(2). Section 227(a)(2) provides no distinctions as to the routing of an electronic signal between the sender and the equipment which receives over a regular telephone line. My computer equipment which is capable of transcribing text or images (or both) from an electronic signal is attached to a regular local exchange subscriber line. Therefore, it is a telephone facsimile machine.

At paragraph 202 of its R&O, the Commission stated that "it would make little sense to apply different rules based on the device that ultimately received [an unsolicited fax]." It makes even less sense to apply different rules based on the intermediate routing of an unsolicited fax.

Section 227(a)(2) does not authorize the Commission to distinguish between fax messages routed from the sender to the receiver's regular telephone line via local exchange

circuits, via trunks between local exchanges, via interexchange circuits, via private microwave circuits, via internet circuits, or any other intermediate circuits. The Commission's conclusory determination that its rules did not apply to unsolicited facsimile advertisements transmitted as email over the Internet was not supported by reason.

Trunk circuits between local exchange central offices are not "regular telephone lines", that is, a telephone consumer cannot connect a telephone facsimile machine to a trunk circuit. Neither can a consumer connect a telephone facsimile machine directly to an interexchange carrier line. A consumer who does not receive electronic signals through the internet via television cable connects to the internet circuit via a regular telephone line. Nevertheless, if a fax is to be transmitted beyond the confines of a single local telephone exchange, intermediate transmission paths which are not regular telephone lines must be included within the routing. It cannot be reasonably suggested that Congress intended for an equipment to be found to be a telephone facsimile machine only if the electronic signal did not pass outside of a single local exchange. Because the Commission provided no rationale for carving out transmission by Internet but not also carving out exceptions from its rules for fax routed via trunks or interexchange circuits, the Commission's action was arbitrary and capricious. On reconsideration, the Commission should hold that an unsolicited fax is prohibited without regard

to the transmission medium which carries the electronic signal to the central office which serves the receiver's regular telephone line.

Extensive Periods Of Consumer Vulnerability Were Unreasonable

The Commission acted unreasonably in allowing telemarketers to continue to call a consumer for up to three months after the consumer has placed his number on the national do-not-call list. If not requiring a telemarketer to access the national list immediately prior to each call as I suggested in my comments, the Commission should require a telemarketer to access the national list and refresh its copy at least once on any day that it makes a telemarketing call.

In its report, "Trends in Telephone Service" released on May 2, 2002, the Commission stated at Table 9.1 that, as of June 2001, there were 192 million end user switched access lines in service nationwide. At paragraph 66 of its R&O, the Commission found that an estimated 104 million telemarketing calls are made each day. Assuming an even distribution of those calls across the 192 million phone lines, a consumer should expect to continue to suffer from

unsolicited telemarketing calls 49 times during the three month period of helplessness established by the Commission.[2]

A telemarketer will gain access to the list via the internet. Programming a computer to access the list automatically via internet is a trivial task. Accessing the list and updating a telemarketer's copy should not require human interaction on a daily basis.[3] Accordingly, the cost to the telemarketer of accessing the list on either a per call basis or once per day basis would not place a significant burden on the telemarketer.

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[2] This calculation does not take into account that not all of the 192 million lines are residential lines and it does not take into account that by October 1, 2003, as many as 60 million residential numbers are expected to have been placed on the national list. If only residential lines, reduced by the count of those on the list, are dialed by telemarketers, then the 104 million daily calls will be more concentrated onto fewer than 192 million numbers and, on a statistical basis, each consumer should be expected to be called substantially more than 49 times during a 90 day period.

[3] Transmission time for a daily access should be negligible if the administrator of the list makes available a file of daily changes each day and the telemarketer revises its copy of the entire list on the basis of the change orders. There is significant precedent for such a procedure — the Commission, itself, makes daily license change files of its Universal Licensing System available to interested persons at its web site.

On balance, the interest of consumers in being free of undesired telemarketing calls upon demand outweighs the reasonably foreseeable cost to telemarketers of avoiding calls to all consumers whose numbers are on the national list. Accordingly, the Commission should require a telemarketer to access the national list and update its copy on either a call-by-call basis as suggested in my comments in the instant proceeding or at least once on any day on which it makes a telemarketing call.

Rules On Abandoned Calls Were Unreasonable

The Commission acted unreasonably in adopting rules concerning abandoned calls. At paragraph 28 of its R&O, the Commission observed correctly that when a telemarketer creates dead air and hang up calls, "consumers have no opportunity to invoke their do-not-call rights and the Commission cannot pursue enforcement actions." The Commission's rule amendments do not solve either of those problems in a reasonable manner.

The Commission failed to take reasonable steps to ascertain whether it is important for "telemarketers to continue to benefit from", R&O at para. 151, predictive dialer use. In contrast to its care to define relevant markets in its Report and Order and Notice of Proposed Rulemaking in MB Docket No. 02-277 (FCC 03-127 Released July 2, 2003), in accord with the rule of United

States v. E.I. du Ponte de Nemours & Co., 351 U.S. 377 (1956), the Commission did not take steps to ascertain the elasticity of demand for telemarketing services. It may well be that advertisers do not view telemarketing as fungible with other advertising services.[4] If that is the case, then the cost of telemarketing may have little effect on the ability of telemarketers to attract clientele and on their ability to offer goods and services to consumers at reasonable prices. What the Commission has done, without sufficient evidence in the record to avoid an arbitrary and capricious action, is to place a burden on consumers to benefit telemarketers who have not been shown to need to have that burden imposed to engage in a profitable business activity. Before permitting telemarketers to abandon any calls, the Commission should have conducted a thorough economic study of the market to enable it to decide whether consumers should be required to pick up telemarketers' litter. Upon reconsideration, the Commission should prohibit all abandoned calls until such time as it has undertaken and completed such a study to ascertain the relevant facts concerning the relevant market.

The Commission adopted new Rule Section 64.1200(a)(6) which provides, in part, that no person or entity shall "abandon more than three percent of all telemarketing calls that are

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[4] The probability that such is the situation was indicated by telemarketers' explanations that they provided marketing services for goods and services which could not otherwise be offered economically.

answered live by a person, measured over a 30 day period." The rule is unreasonable because the telemarketer cannot know whether its call was answered live by a person or dead by an answering machine or voicemail machine. To know whether the call was answered live by a person, the telemarketer's live person would have to hear the live consumer answer, and if the telemarketer's live person heard the live consumer, the call would not be abandoned. Rather, the telemarketer's live person would begin the sales pitch. Because the telemarketer which abandons an answered call cannot know whether a call was answered mechanically or live by a person, the rule is unreasonable and unenforceable on its face. To protect consumers at no additional out-of-pocket cost to telemarketers, the Commission should revise Rule Section 64.1200 to prohibit the abandonment of any call which is answered.[5]

The R&O does not indicate that the Commission adequately considered the effect on telephone consumers of a 3 percent abandonment rate. Again using the Commission's determinations that telemarketers make 104 million calls per day and that there are 192 million phone lines in service, at an abandonment rate of 3 percent, telemarketers can be expected to

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[5] A telemarketer cannot make a sale if it hangs up after the called number has answered. Therefore, telemarketers have no reasonable objection to being prohibited from abandoning a call which has been answered.

abandon 93.6 million calls per month — one billion, 139 million per year. Not adjusting upward for the facts that not all 192 million phone lines are residential and that tens of millions of consumers will be on the national list, each residence can still expect to suffer an abandoned call every other day.[6] It is not reasonable to place that burden on consumers solely to benefit one certain line of business. There is scant evidence in the record of the instant proceeding to indicate that consumers desire to receive telemarketing calls and no evidence that they desire to receive or that they benefit in any way from abandoned calls.[7]

Also in new Rule Section 64.1200(a)(6), the Commission stated that "a call is 'abandoned' if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting." Rather obviously, the only way that the telemarketer can know when the called person has completed his greeting is for the call to be connected to a live

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[6] If non-residential numbers and numbers on the national list are subtracted from the 192 million lines and telemarketers make 104 million calls per day, the rate of abandoned calls per residential line will be greater.

[7] A consumer who suffers an abandoned call cannot buy from the telemarketer, regardless of the price of the goods or service. Therefore, the victim of an abandoned call receives no benefit, whatsoever, from any cost saving which either the telemarketer or the provider of the goods or service may receive from the practice of abandoning calls.

sales representative; a machine can't know.[8] Since the telemarketer cannot know when the called person has completed her greeting unless a live sales representative is connected to and can hear the called person, the rule makes no sense. It would be impossible for a telemarketer to act reliably in accord with the rule and to keep the required records and it would be impossible for the Commission to enforce its rules based on this definition of "abandoned".

New Rule Section 64.1200(a)(6) provides that

> whenever a sales representative is not available to speak with the person answering the call, that person must receive, within two (2) seconds after the called person's completed greeting, a prerecorded identification message that states only the name and telephone number of the business, entity, or individual on whose behalf the call was placed, and that the call was made for "telemarketing purposes".

The rule is unreasonable in light of the Commission's holding that the test of whether a call is a telephone solicitation is the intent of the caller. In its discussion of what constitutes a telephone solicitation or an advertisement, the Commission was clear that the test is the caller's intent. At

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[8] Persons greet telephone callers in various ways. Alexander Graham Bell preferred to say "Ahoy". Some may say "hello", some may say "ola", others may say "da?", some may say, "It's your thirty-five cents," some may say nothing until a caller speaks, and some may greet the caller with "Hi, this is John Doe, the world's greatest lover. I sure hope that you're a telemarketer because I've been waiting for a telemarketing call all day. [long pause] At your convenience, go ahead please."

paragraph 49, the Commission explained that calls made "for the purpose of encouraging the purchase of goods and services fall within the statutory definition of telephone solicitation." At paragraph 142, the Commission held that if a call is "intended to offer property, goods, or services for sale either during the call, or in the future (such as in response to a message that provides a toll-free number), that call is an advertisement."

Section 64.1200(a)(2)(iii) of the Commission's Rules provides that no person or entity may "initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation." If the intent or purpose of a call is to encourage the purchase of goods or services or to offer property, goods, or services for sale either during the call or in the future, then the Commission has held in its R&O that the call *is, per se,* an unsolicited advertisement and a telephone solicitation. Consequently, a telemarketer cannot comply with the prerecorded identification announcement of Rule Section 64.1200(a)(6) without violating Rule Section 64.1200(a)(2). The only way to resolve the obviously unreasonable contradiction is for the Commission to flatly ban the use of any predictive dialer which has an abandonment rate greater than zero.

A reasonable and internally consistent Commission rule that simply prohibits the use of predictive dialers would not be inconsistent with the FTC's three (3) percent rule. The two agencies' rules will not be inconsistent because neither agency will require a telemarketer to take any action which is prohibited by the other agency. The telemarketer which complies with the Commission's ban on predictive dialers would also not violate the FTC rule. The telemarketer which complied with the FTC's rule and abandoned no more than three percent of calls could not be prosecuted by the FTC, although it might be prosecuted by the Commission for wilful violation of the Commission's rule.

New Rule Section 64.1200(a)(6) places an unreasonable burden on telephone consumers. The rule provides that the telephone number which the telemarketer's prerecorded announcement must provide "may not be a 900 number or any other number for which charges exceed local or long distance transmission charges." Long distance charges to where (Nepal?) and for what length of call (20 minutes on hold?)? The telemarketer originates the sequence of calling a consumer, abandoning the call, and providing the consumer with a telephone number to call to demand relief. Therefore, the Commission should place entirely on the telemarketer the burden

of paying the cost of the consumer's call to request inclusion on the company-specific do-not-call list.[9]

[9] In the case of the consumer who does not desire to be placed on the national list, but desires to be placed selectively on company-specific lists, the cost of toll calls could be substantial. As explained herein, there is a 0.54 probability that a consumer will receive one telemarketing call per day (104 million telemarketing calls per day divided by 192 million telephone lines). The Commission's rule could unreasonably burden such a consumer with making a toll call at her expense every other day.

Permitting the telemarketer to stick the consumer with long distance charges to seek relief from grief caused by the telemarketer is especially unreasonable because the Commission adopted no rule requiring that the caller receive immediate service (that is, not be put on interminable hold) and no rule prohibiting the telemarketer from making the caller wait to make his request for do-not-call listing until the telemarketer has delivered an extensive sales pitch at the customer's out-of-pocket expense. If not revising its rules to prohibit the abandonment of calls by telemarketers, the Commission should require that the telemarketer provide a telephone number, and include that number, and no other, in its Caller ID, which the abandoned consumer may call at no toll charge to the consumer. The Commission should also require that the telemarketer provide the consumer with an opportunity to request listing within two (2) seconds of answering the consumer's call.

Conclusion

For all the foregoing reasons, the Commission should reconsider its action in the above captioned matter and revise its Rules as requested herein.

Respectfully submitted,

/s/ Dennis C. Brown

126/B North Bedford Street
Arlington, Virginia 22201
703/525-9630

Dated: August 18, 2003